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No. 03-1441

In The
Supreme Court of the United States

DARIUS D. BISHOP, ALVIN C. FLEMING, and JOHN F. BROWN,

Petitioners,

v.

STATE OF NEW JERSEY and THE NEW JERSEY DEPARTMENT OF PERSONNEL and THE MERIT SYSTEM BOARD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF THE STATE OF NEW JERSEY RESPONDENTS

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QUESTION PRESENTED

Was the Title VII complaint time-barred where the EEOC charge was filed well beyond 300 days after the alleged discriminatory examination was administered and eligibility list was promulgated by the State respondents, and the promotions to fire captain made later from the list in rank order by the City of Newark were merely the neutral effects of the allegedly discriminatory examination?

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STATEMENT OF THE CASE

This petition by three firefighters disappointed that they were not promoted to fire captain by the City of Newark, New Jersey, asks the Court to review a decision by the Third Circuit in which that court merely applied the law settled by this Court in *Delaware State College v. Ricks*, 449 *U.S.* 250 (1980), to conclude on the facts that the EEOC charge against the State defendants was untimely, that there was no continuing violation that extended the statutory limitations period and, as a result, that the Title VII discrimination complaint against the State was correctly dismissed by the trial court. There is no compelling reason for this Court to review the Third Circuit's unremarkable application of the standards enunciated in *Ricks* to the particular facts of this case and, therefore, the petition should be denied.

Petitioners Darius Bishop, Alvin Fleming and John F. Brown (collectively referred to as "Bishop") are three African-American firefighters employed by the City of Newark Fire Department (the "City") who passed an examination for promotion to fire captain administered in 2000 by respondent New Jersey Department of Personnel ("Department"). On April 12, 2001, the Department promulgated a list of candidates eligible for promotion to fire captain throughout the State, including the City. Of the 257 candidates in Newark who took the exam, 129 passed and were listed in the order of their score. Bishop was ranked 66 on the list, Fleming held the number 56 spot and Brown was listed at 93. The list had a three-year life and was valid until April 3, 2004.* Municipal fire

* While Bishop's challenge to the examination was pending before the courts below, the Department of Personnel extended the April 12, 2001 eligibility list for one year and, as a result, the list remains valid

departments use the list to promote firefighters to available captain positions in the order in which they are ranked. (Pa2).* The same day that the eligible list was announced, Bishop filed an administrative appeal with respondent Merit System Board, a State entity with statutory authority to adjudicate challenges to civil service examinations in New Jersey. Bishop challenged the format and administration of the examination (Pa3). Ultimately, this appeal was denied. (Pa4).

In December 2001, the City made 15 promotions to fire captain. On January 21, 2002, Bishop filed discrimination charges with the Equal Employment Opportunity Commission ("EEOC") naming only the City. The EEOC charges alleged that the exam unlawfully operated to exclude Bishop from promotion based on race (Pa3). In February 2002, the City made a second round of promotions from the list. Additional promotions were made by the City in July 2002.

On May 7, 2002, Bishop filed a Title VII complaint against the Department and the Merit System Board (the "State defendants") and the City. In this complaint Bishop alleged, in language similar to his earlier EEOC charge, that "the nature and administration of the exam disproportionately excluded plaintiffs from promotion because of their race."** (Pa3). In July 2002, the State defendants

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and will not expire until April 11, 2005. *N.J. Stat. Ann.* 11A:4-6 (authorizing the Department to extend the eligibility list to a maximum of four years).

* "Pa" refers to the appendix accompanying Bishop's petition. Citations below to "Pb" refer to the petition.

** Bishop's petition repeats allegations contained in his May 2002 complaint regarding the alleged disparate impact of the examination and, based on these allegations, he asserts in the petition that "this

moved to dismiss the complaint because Bishop had failed to exhaust administrative remedies. Bishop responded on August 2, 2002 by filing a second EEOC charge, this time naming the State defendants "solely in the remote chance the Court requires such a filing." (Pa16). The EEOC charge against the State parroted the earlier charge, complaining that the "exam had a disparate impact on plaintiffs, that the results were defective and that plaintiffs were discriminated against in the preparation, administration and validation of the exam." (Pa4). On September 26, 2002, the district court dismissed the May 2002 complaint against the State defendants because Bishop had failed to exhaust administrative remedies. The complaint against the City survived and remains pending. (Pa4).

On November 14, 2002, Bishop filed a second Title VII action against the State defendants based on the August 2002 EEOC charge. This complaint was virtually identical

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evidence clearly established a *prima facie* case of discrimination." (Pb2). This assertion and the supporting "evidence" are misleading. *Sup. Ct. R.* 15.1 (obligation to point out perceived misstatements). As a threshold matter, the evidence Bishop asserts as facts are merely untested allegations that were not the subject of any factfinding by the courts below. Moreover, Bishop conveniently overlooks the fact that the examination was given to all candidates for promotion across the State, not just candidates in Newark, pursuant to a 1980 consent decree with the United States Department of Justice (Pa3, n.2). The statewide results of the examination paint quite a different picture. The statewide passing rates on the oral component were 67% for whites and 58% for blacks. The passing rates on the written component were 92% for whites and 79% for blacks. Hence, the ratio for successful African American compared to white candidates across the State for each component of the test was approximately 86%, well above the 80% rate established by the Uniform Guidelines on Employee Selection Procedures. *See* 28 *C.F.R.* §50.14.4D (adverse impact generally is not present when the ratio or "selection rate" is greater than 80%).

to the earlier complaint. The second complaint noted that Bishop's August 2002 charge had been filed within 300 days of the last discriminatory employment practice, namely the July 2002 promotions. (Pa5)

In an order and opinion entered on March 11, 2003, the district court dismissed the November 2002 complaint against the State defendants on the ground that the EEOC charge had not been filed within 300 days of the act of discrimination as required by 42 U.S.C. §2000e-5(e)(1) and therefore was time-barred as outside the statutory limitations period. In reaching this conclusion, the court rejected Bishop's argument that the use of the eligible list to make promotions in February and July 2002 constituted a continuing violation and, as a result, that the EEOC charge filed in August 2002 was timely. (Pa13-Pa27). Bishop appealed.

On January 5, 2004, the Third Circuit issued an opinion affirming the district court's judgment and holding that the limitations period had run by the time Bishop filed his EEOC charge against the State defendants (Pa6-Pa7). The Third Circuit correctly reasoned that its decision was mandated by this Court's opinion in *Delaware State College v. Ricks*, 449 *U.S.* 250 (1980). (Pa7). As instructed by *Ricks*, the court below determined that the precise employment practice challenged by Bishop was the design and administration of the exam and the resulting promulgation of the eligibility list. (Pa9-Pa10). The court also observed that neither Bishop's EEOC charge nor his Title VII complaint alleged that the promotions themselves were discriminatory. (Pa10, n.9). Thus, applying the settled principles established in *Ricks* to the particular facts of this case, the court below rejected Bishop's theory that there was a violation each time a promotion was

made because "[t]he neutral use of the eligibility list by municipal fire departments is merely the effect of the alleged discriminatory exam. Therefore, the statute of limitations began running on the date that the eligibility list was promulgated." (Pa10).

According to the Third Circuit, it made no difference that Bishop had passed the exam and, therefore, stood a chance to be promoted until the list expired in April 2004. The court, applying the principles set forth in *Ricks*, explained that the assignment of an alleged discriminatory ranking is the relevant discriminatory act, even where an adverse employment action is not certain to follow from a low ranking, and the mere possibility of promotion does not mean that the failure to promote is a separate discriminatory act. (Pa11-Pa12). Hence, consistent with the standards enunciated in *Ricks*, the court rejected Bishop's continuing violation theory and affirmed the district court's dismissal of the complaint because the EEOC charge was untimely. (Pa12).

Bishop filed a petition for writ of *certiorari* with this Court on April 2, 2004. The petition was entered on the Court's docket on April 19, 2004.

SUMMARY OF REASONS FOR DENYING THE PETITION

1. The petition should be denied because the Third Circuit merely applied to the particular facts of this case the principle long-settled by this Court in *Delaware State College v. Ricks*, 449 *U.S.* 250 (1980), that the present but neutral effects of a past act of discrimination do not

constitute a continuing violation for the purpose of measuring the limitations periods of Title VII.

2. An administrative charge must be filed with the EEOC within 300 days after the alleged unlawful employment practice. 42 *U.S.C.* §2000e-5(e)(1). In determining whether a charge is timely, a court is required by the express language of Title VII to identify the precise employment practice that is challenged. In making this determination, the focus is on whether a *present* violation has been alleged – the neutral effects, no matter how painful, of a past act of discrimination cannot extend the limitations period. *Ricks*, *supra*, 449 *U.S.* at 257-58.

3. The opinion below merely applied these settled principles to the particular facts of the case and, not surprisingly, concluded that there was no continuing violation that extended the limitations period. Bishop complained that the examination and resulting eligibility list for promotion to fire captain discriminated against him. He did not allege that the City's application or use of the eligibility list was discriminatory. Thus, the examination and resulting promotional list were the discriminatory acts and each failure by the City to promote Bishop was merely the neutral effect of a past act of discrimination that does not constitute a continuing violation.

4. It is of no significance that Bishop passed rather than failed the exam and, therefore, could have been promoted during the life of the eligibility list. The opportunity for promotion does not alter the fact that the administration of the exam and the creation of the eligibility list were the only acts of discrimination. Indeed, Bishop was well aware of his discrimination claim at the time the list was created.

5. Nor is there a conflict between the opinion below and the decisions of other Courts of Appeals, as argued by Bishop in his petition. *Sup. Ct. R.* 10. Contrary to Bishop's claim here, the Fifth and Second Circuits merely held on the particular facts of each case that there was a discriminatory act within the limitations period, not that in every instance the use of a promotional list constitutes a new act of discrimination triggering anew the statute of limitations.

REASONS FOR DENYING THE PETITION

There is no compelling reason why the Court should review this case because the opinion below is consistent with this Court's prior decisions and is not in conflict with the holdings of other Courts of Appeals that have considered this issue. *Sup. Ct. R.* 10. The opinion below merely applied the well-established principle that the Title VII limitations periods begin to run from the time of the alleged discriminatory act, not from when the neutral consequences of the discrimination are felt. *Delaware State College v. Ricks, supra,* 449 *U.S.* at 258 (1980). This unremarkable application of settled law does not warrant further review.

An administrative charge of discrimination must be filed with the EEOC no later than 300 days after the alleged unlawful employment practice. 42 *U.S.C.* §2000e-5(e)(1). Timely filing of the charge is a prerequisite to the maintenance of a Title VII action. *Alexander v. Gardner-Denver Co.*, 415 *U.S.* 36, 47 (1974). In determining whether a charge is timely, it is necessary to identify precisely the unlawful employment practice that is

challenged. *Ricks, supra*, 449 *U.S.* at 257. As explained in *Ricks*, the limitations period commences when the allegedly discriminatory acts took place, not when the consequences of those acts became most painful. *Ricks*, at 258. Thus, the limitations period cannot be extended based on a party's claim that a neutral practice that took place within the applicable limitations period gives present effect to past illegal acts that took place outside of the limitations period. All the court below did was apply these settled standards governing the Title VII limitations periods to the particular facts of the discrimination claim asserted by Bishop.

The Third Circuit properly recognized that its decision was mandated by the standards enunciated by this Court in *Ricks*.* There, a professor at Delaware State College challenged the college's decision to deny him tenure as unlawfully based on national origin discrimination. After tenure was denied, and consistent with its usual practice, the college entered into a one-year "terminal" contract with Ricks that allowed him one extra year of employment before his actual termination. *Id.*, 449 *U.S.* at 252-54. Ricks set forth a "continuing violation" theory, arguing that his unlawful termination claim accrued on his final date of employment because discrimination not only motivated the original tenure denial decision but also the

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* The court below also relied on its decision in *Bronze Shields, Inc. v. New Jersey Dept. of Civil Service*, 776 F.2d 1074 (3d Cir. 1981), *cert. denied*, 458 *U.S.* 1122 (1982), which held that Newark's use of an eligible list to hire police officers was not a continuing violation, but merely the neutral consequence of the earlier discriminatory promulgation of the hiring list. However, it is not necessary to discuss separately the court's opinion in *Bronze Shield* because, as the court observed here, *Ricks* alone compelled the decision in Bishop's case. (Pa7).

later termination decision under the one-year terminal contract. 449 *U.S.* at 256.

This Court rejected Ricks' continuing violation theory on the facts presented and held that the limitations period began to run on the date when the college made the tenure decision, not upon the expiration of his contract. In reaching this decision, the Court explained that it first had to identify precisely when, in the words of Title VII, the "unlawful employment practice" that Ricks challenged took place. *Ricks*, *supra*, 449 *U.S.* at 257. Ricks argued that both the tenure decision and the college's decision to terminate him were discriminatory. The Court pointed out, however, that his argument could not be squared with the complaint because he did not allege any discriminatory acts that continued to the actual termination of his employment. 449 *U.S.* at 257. As the Court explained,

> [i]n order for the limitations periods to commence with the date of discharge, Ricks would have had to allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure. But no suggestion has been made that Ricks was treated differently from other unsuccessful tenure aspirants. [449 *U.S.* at 258].

Thus, the Court concluded that the only alleged discrimination occurred at the time Ricks was informed of the tenure decision and the limitations period commenced at that time. This conclusion was required, the Court added, "even though one of the *effects* of the denial of tenure – the eventual loss of a teaching position – did not occur until later." *Id.*, at 258. In this regard, the Court observed that the proper focus is on the time of the discriminatory acts,

not the time when the consequences of the act became most painful. *Ibid.*

These principles compelled the court below to dismiss Bishop's discrimination claim as time-barred and to reject his continuing violation theory. The only acts alleged by Bishop to be discriminatory were the examination and promulgation of the eligibility list. Tellingly, Bishop continues to maintain in his petition for review by this Court that all of his claims "stem from a discriminatory examination, which was used to create an eligibility list of firemen who could be promoted to the position of fire captain for the City of Newark." (Pbi). Hence, there was no question in this case that the "unlawful employment practice" challenged by Bishop was the discriminatory exam.

Just as Ricks did not allege that the later termination decision was discriminatory, Bishop did not allege that the later consequences of the alleged discriminatory exam – the City's failure to promote him – were themselves discriminatory. Bishop did not allege, as *Ricks* teaches he must to avoid having his complaint dismissed as untimely, that the manner in which the decision was made not to promote him differed from the manner in which the City failed to promote other candidates on the list. *Ricks, supra*, 449 *U.S.* at 258. As in *Ricks*, Bishop has not suggested that he was treated differently from other unsuccessful candidates for promotion. Indeed, there is no question in this case that all candidates were treated alike and the City made promotions simply on the basis of a candidate's rank on the list. Therefore, the Third Circuit correctly concluded, consistent with the mandate by this Court, that the neutral use of the eligibility list by the City to make promotions was merely the effect of the alleged

discriminatory exam and, as a result, the complaint against the State defendants was time-barred because the limitations period began running on the date the eligibility list was promulgated. (Pa9-Pa10).*

This conclusion is not altered by any argument Bishop has advanced. Bishop reasons that *Ricks* and *Bronze Shield* do not control his case because he was on the eligibility list and therefore stood a chance to be promoted until the list expired. (Pb8-Pb10). He should not be expected, the argument goes, to pursue his rights as a matter of judicial economy until the list expires. This reasoning, however, was flatly rejected in *Ricks*. The Third Circuit in *Ricks* had reasoned, along lines similar to those advanced here, that the initial decision to terminate might be reversed and, therefore, an aggrieved employee should not be expected to resort to litigation until he was injured by the actual termination on the last day of employment. Thus, the lower court held that the limitations period did not start to run until the terminal contract had expired. *Ricks, supra*, 449 *U.S.* at 255-56. However, the Supreme Court reversed, ruling instead that the limitations period

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* The principles in *Ricks* were recently affirmed by the Court in *National Railroad Passenger Corp. v. Morgan*, 536 *U.S.* 101 (2002). Discussing with approval the holding in *Ricks*, the Court in *Morgan* explained that Ricks "could not use a termination that fell within the limitations period to pull in the time-barred discriminatory act [the discrete decision to deny tenure]. Nor could a time-barred act justify filing a charge concerning a termination that was not independently discriminatory." 536 *U.S.* at 113. Likewise, in the present case, Bishop could not use a failure to promote "that fell within the limitations period to pull in the time-barred discriminatory act" alleged to be the examination and resulting eligibility list. Nor could the time-barred examination justify filing a charge concerning a failure to promote that was not alleged to be independently discriminatory.

started to run when the tenure decision was made known to Ricks. 449 *U.S.* at 259.

In this case, Bishop filed an administrative appeal challenging the examination on the very day in April 2001 that the eligibility list was announced. Clearly, he was well aware that he had been injured by the exam when the list was published and he showed no interest in avoiding premature litigation. As the court below wisely observed, Bishop's concern for the conservation of judicial resources "does not transform neutral effects into allegedly discriminatory acts" (Pa11). *Accord Cox v. City of Memphis*, 230 *F.*3d 199, 205 (6th Cir. 2000) ("the assignment of an allegedly discriminatory ranking is the relevant discriminatory act even where the low ranking is not a 'certain prelude' for an adverse employment action").*

Bishop also mistakenly asserts that *Ricks* does not apply to his case because, unlike the isolated instances of discrimination in *Ricks*, his claim is based "on an ongoing and continuing practice of discrimination that began with the 2000 promotional examination and continues with each promotion made from the list derived from that examination." (Pb9). Significantly, Bishop does not refer to any allegation in his EEOC charge or Title VII complaint to support this assertion or to suggest that the promotions themselves were anything more than the neutral effects of the discriminatory examination. This is precisely the reason the Court held in *Ricks* that the tenure decision, not the termination of the professor's employment, was the

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* If Bishop's theory is correct, and he should not be expected to pursue his rights until the eligibility list expires and the effects of the examination will be certain, then the discrimination claim he has asserted in this case is premature because the list does not expire until April 2005.

unlawful employment practice that triggered the limitations period.*

Finally, there is no conflict among the lower appellate courts that requires this Court's review. *Sup. Ct. R.* 10(a). Bishop relies exclusively on *Walls v. Mississippi State Dept. of Public Welfare*, 730 *F.*2d 306 (5th Cir. 1984) and *Guardians Association, etc., et al. v. Civil Service Comm'n*, 633 *F.*2d 232 (2d Cir. 1980), *cert. denied sub. nom., Civil Service Comm'n v. Guardians Association etc., et al.*, 463 *U.S.* 1228 (1983), for the observation that these courts, unlike the Third Circuit below in this instance, applied the continuing violation theory in cases involving the use of hiring lists. (Pb10). This observation is unexceptional and certainly does not raise a conflict. After all, *Ricks* does not rule out the application of the continuing violation theory in all hiring list cases and neither did the Third Circuit in this case or in *Bronze Shield*. Rather, the court below held that Bishop had not alleged a discriminatory use of the promotional eligibility list that might extend the limitations period. In other words, Bishop failed to allege facts that could support a continuing violation theory.

The Third Circuit's holding below is consistent with the two opinions relied on by Bishop in his petition. In *Walls*, black candidates who were not hired for social worker positions with the Mississippi Public Welfare Department alleged in their EEOC charge, unlike Bishop

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* Similarly unavailing is Bishop's notion that the limitations period cannot be interpreted to deprive him of the right to pursue his discrimination claim (Pb6). To the contrary, the time limitations provided by Congress reflect " 'a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.' " *Ricks, supra* 449 *U.S.* at 260 (quoting *Johnson v. Railway Express Agency, Inc.*, 421 *U.S.* 454, 463-64 (1975)).

in this case, that each stage in the selection process was discriminatory, including the establishment of preliminary educational requirements, the development of the examination, the creation of the certificates of eligibles, and the hiring decisions themselves. As the court found, the ranking of the candidates on the certificates, which was based on an invalid examination, was but one factor in the subjective selection process that was applied to the plaintiffs in Mississippi. Here, unlike the selection process in *Walls*, promotions were made by the City strictly in rank order and Bishop did not allege that the promotions were carried out in a discriminatory manner. Thus, the black candidates in *Walls* had filed a timely charge because, unlike Bishop in this case, they had alleged discriminatory acts that continued throughout the subjective selection process.

Likewise, the Second Circuit concluded in *Guardians* that the EEOC charge was timely because, unlike the firefighters in Bishop's case, the minority police officers in *Guardians* had alleged a continuing violation, which began with a discriminatory examination and culminated in the City's refusal to hire them. *Guardians*, *supra*, 633 *F.*2d 250-51. The trial court in *Guardians* had found, and the appellate court declined to disturb the finding, that the refusal to hire within the limitations period was indeed based on the City's discriminatory policy. *Guardians*, *supra*, 633 *F.*2d at 237, n.7. In marked contrast to *Guardians*, there are no comparable allegations or findings of discrimination concerning the promotions in Bishop's case and, therefore, there is no conflict between *Guardians* and court's opinion below.

Even if the result in *Guardians* could be read to be at odds with the Third Circuit's view in this case, there still

can be no conflict because at the time it issued the *Guardians* decision, the Second Circuit did not have the benefit of this Court's guidance in *Ricks*, which required that the illegal employment practice must be identified with precision because the neutral effects of a past act of discrimination cannot extend the limitations period. Therefore, the court's holding in *Guardians* cannot possibly conflict with either the standards enunciated by this Court in *Ricks* or the decision of the court below in Bishop's case. Certainly, the conflict asserted by Bishop does not support this Court's exercise of discretionary review.* *Sup. Ct. R.* 10(a).

In conclusion, the Third Circuit decision for which review is sought merely applied well-established principles governing the application of the Title VII limitations periods to the circumstances of this case and correctly concluded that Bishop's EEOC charge was untimely. Bishop alleged that the examination and resulting eligibility list were discriminatory, but he did not allege that the list was applied to him in any way that differed from its application to other unsuccessful candidates for promotion. Therefore, for purposes of Title VII, the "unlawful employment practice" that triggered the 300-day limitations period for filing an EEOC charge was the examination and eligibility list, not the later promotions, which

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* Nor is a conflict suggested by Bishop's passing reference (Pb11-Pb12) to two other appellate opinions – *Gonzalez v. Firestone Tire & Rubber Co.*, 610 *F.*2d 241 (5th Cir. 1980), and *Beavers v. American Cast Iron Pipe Co.*, 975 *F.*2d 792 (11th Cir. 1992). Just as in *Guardian* and *Walls*, the courts in *Gonzalez* and *Beavers* determined that the charges were timely because the plaintiffs had alleged continuing discriminatory acts within the limitations period. Bishop made no such allegation about the City's promotions, and the court below determined that Bishop's challenge was limited to the discriminatory exam and list.

were the neutral effects of the past allegedly discriminatory examination. This unexceptional conclusion presents no compelling reason requiring further review by this Court and Bishop's petition for a writ of *certiorari* should therefore be denied.

CONCLUSION

For all of the reasons expressed here, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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